



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket Nos. FWS-R6-ES-2011-0111; FWS-R6-ES-2012-0108]

[4500030114]

RIN 1018-AZ20; RIN 1018-AX71

Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for Gunnison Sage-Grouse and Proposed Designation of Critical Habitat for Gunnison Sage-Grouse

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period; announcement of public hearings; notice of availability of supplementary documents.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment periods on our January 11, 2013, proposed rules to list the Gunnison sage-grouse (*Centrocercus minimus*) as endangered and to designate critical habitat for the species under the Endangered Species Act of 1973, as amended (Act). For the proposed designation of critical habitat for the Gunnison sage-grouse, we also announce the availability of a draft economic analysis (DEA), a draft environmental assessment (EA), and an amended required determinations section. In addition, we announce two public informational sessions and public hearings for both the proposed listing and proposed critical habitat, and we provide information on several conservation efforts that may be considered in our final determinations. We are reopening the comment periods to allow all interested parties an additional opportunity to comment on the proposed listing and the proposed designation of critical habitat, and to comment on the proposed critical habitat's associated DEA, draft EA, and amended required determinations section. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rules.

DATES: *Comment submission:* We will consider comments received or postmarked on or before October 19, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date.

Public informational sessions and public hearings: We will hold two public

informational sessions followed by public hearings on the following dates:

- October 7, 2013, from 4:00-9:00 p.m., including an information session from 4:00-5:00 p.m., a break, and a public hearing from 6:00-9:00 p.m.; and
- October 8, 2013, from 4:00-9:00 p.m., including an information session from 4:00-5:00 p.m., a break, and a public hearing from 6:00-9:00 p.m..

See the **ADDRESSES** section, below, for information on where these public informational sessions and public hearings will be held.

ADDRESSES:

Document availability: You may obtain copies of the January 11, 2013, proposed rules on the Internet at <http://www.regulations.gov> at Docket No. FWS-R6-ES-2012-0108 for the proposed listing and at Docket No. FWS-R6-ES-2011-0111 for the proposed designation of critical habitat. You may obtain a copy of the draft economic analysis and the draft environmental assessment at Docket No. FWS-R6-ES-2011-0111. Alternately, you may obtain a copy of either proposed rule, the draft economic analysis, or the draft environmental assessment by mail from the Western Colorado Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Comment submission: You may submit written comments by one of the following methods:

- (1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Submit comments on the listing proposal to Docket No.

FWS–R6–ES–2012–0108, and submit comments on the critical habitat proposal and associated draft economic analysis and draft environmental assessment to Docket No. FWS–R6–ES–2011–0111.

(2) *By hard copy*: Submit comments on the listing proposal by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R6–ES–2012–0108; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203. Submit comments on the critical habitat proposal, draft economic analysis, and draft environmental assessment by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R6–ES–2011–0111; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

Public informational sessions and public hearings:

The October 7, 2013, public informational session and public hearing will be held at Western State Colorado University, University Center, 600 N. Adams Street in Gunnison, Colorado.

The October 8, 2013, public informational session and public hearing will be held at Monticello High School Auditorium, 164 South 200 West in Monticello, Utah.

People needing reasonable accommodations in order to attend and participate in the public hearing should contact Patty Gelatt, Western Colorado Supervisor, Western Colorado Field Office, as soon as possible (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Patty Gelatt, Western Colorado Supervisor, U.S. Fish and Wildlife Service, Western Colorado Field Office, 764 Horizon Drive, Building B, Grand Junction, CO 81506–3946; by telephone (970–243–2778); or by facsimile (970–245–6933). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this comment period on: (1) Our proposed listing determination for the Gunnison sage-grouse that published in the **Federal Register** on January 11, 2013 (78 FR 2486); (2) our proposed designation of critical habitat for the Gunnison sage-grouse that published in the **Federal Register** on January 11, 2013 (78 FR 2540); (3) our DEA of the proposed critical habitat designation;

(4) our draft EA of the proposed critical habitat designation; (5) the amended required determinations provided in this document for the proposed critical habitat designation; and (6) the issues raised in our July 19, 2013, **Federal Register** publication (78 FR 43123) regarding scientific disagreement about the species. We will consider information and recommendations from all interested parties.

We request that you provide comments specifically on our listing determination under Docket No. FWS–R6–ES–2012–0108.

We request that you provide comments specifically on the critical habitat determination and related DEA and draft EA under Docket No. FWS–R6–ES–2011–0111.

We are particularly interested in comments concerning:

- (1) The species' biology, range, and population trends, including:
 - (a) Habitat requirements for feeding, breeding, and sheltering;
 - (b) Genetics and taxonomy;
 - (c) Historical and current range, including distribution patterns;
 - (d) Historical and current population levels, and current and projected trends; and
 - (e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species.

(4) Existing regulations that may be addressing threats to this species.

(5) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

(6) Any information on the biological or ecological requirements of the species and ongoing conservation measures for the species and its habitat.

(7) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act, including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(8) With respect to the proposed designation of critical habitat, specific information on:

- (a) The amount and distribution of Gunnison sage-grouse habitat;
- (b) What may constitute “physical or biological features essential to the conservation of the species” within the geographical range currently occupied by the species;
- (c) Where these features are currently found;
- (d) Whether any of these features may require special management considerations or protection;
- (e) What areas, that were occupied at the time of listing (or, in this case, are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why; and
- (f) What areas not occupied at the time of listing (or, in this case, the present time) are essential for the conservation of the species and why.

(9) Land use designations and current or planned activities in the areas occupied

by the species or proposed to be designated as critical habitat, and possible impacts of these activities on this species and proposed critical habitat.

(10) Information on the projected and reasonably likely impacts of climate change on the Gunnison sage-grouse and proposed critical habitat.

(11) With respect to the proposed designation of critical habitat, any foreseeable economic, national security, or other relevant impacts that may result from designating any areas that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas from the proposed designation that are subject to these impacts.

(12) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and particularly whether the benefits of potentially excluding any specific area outweigh the benefits of including that area as set forth in section 4(b)(2) of the Act. For instance, should the proposed designation exclude properties currently enrolled in the Gunnison sage-grouse candidate conservation agreement with assurances, properties under conservation easement, or properties held by conservation organizations, and why?

(13) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to

assist us in accommodating public concerns and comments.

(14) Information on the extent to which the description of economic impacts in the DEA is complete and accurate.

(15) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

We are also interested in comments concerning the topics raised in our July 19, 2013, **Federal Register** notice (78 FR 43123) announcing the extension of the timeline for issuing final determinations on the listing and critical habitat for the Gunnison sage-grouse due to scientific disagreement, which include:

(1) Whether we have appropriately interpreted the scientific studies cited in the proposed rule, and whether there is additional scientific information we may have overlooked;

(2) Gunnison sage-grouse population trends in each population area;

(3) The scope and effectiveness of regulatory mechanisms enacted by Gunnison

County to address threats to the Gunnison sage-grouse;

(4) Projections for future residential development and human population growth within the Gunnison sage-grouse's range in the Gunnison Basin, including portions of Gunnison and Saguache Counties; and

(5) What constitutes historical habitat and important current habitat for the species.

If you submitted comments or information on the proposed listing rule (78 FR 2486) or proposed designation of critical habitat (78 FR 2540) during their initial comment period from January 11, 2013, to April 2, 2013, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determinations. Similarly, if you already submitted comments or information on either proposed rule in response to the July 19, 2013, announcement of extension of the timeline for making final determinations due to scientific disagreement (78 FR 43123), please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determinations. Our final determinations concerning listing and critical habitat will take into consideration all written comments and any additional information we receive during all comment periods. On the basis of public comments, we may, during the development of our final determination, revise our

proposed listing and/or find that areas proposed as critical habitat are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning the proposed rules, DEA, draft EA, or amended required determinations section by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. We will post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rules, DEA, draft EA, an amended required determinations section will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS–R6–ES–2012–0108 and Docket No. FWS–R6–ES–2011–0111, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Western Colorado Field Office (see **FOR FURTHER**

INFORMATION CONTACT). You may obtain copies of the proposed listing rule on the Internet at <http://www.regulations.gov> at Docket Number FWS–R6–ES–2012–0108, and the proposed designation of critical habitat, DEA, and draft EA on the Internet at <http://www.regulations.gov> at Docket No. FWS–R6–ES–2011–0111. Alternately, you may obtain a copy of either proposed rule, the draft economic analysis, or the draft environmental assessment by mail from the Western Colorado Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the Gunnison sage-grouse and several ongoing conservation efforts for the Gunnison sage-grouse in the remainder of this document. For more information on the Gunnison sage-grouse and its habitat, or additional information on previous Federal actions concerning the Gunnison sage-grouse prior to January 11, 2013, refer to the proposed listing rule published in the **Federal Register** on January 11, 2013 (78 FR 2486), which is available online at <http://www.regulations.gov> (at Docket Number FWS–R6–ES–2012–0108) or from the Western Colorado Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On January 11, 2013, we published a proposed rule to list the Gunnison sage-grouse as endangered (78 FR 2486) and a proposed rule to designate critical habitat for the Gunnison sage-grouse (78 FR 2540). We proposed to designate as critical habitat approximately 1,704,227 acres (689,675 hectares) in seven units located in Chaffee, Delta, Dolores, Gunnison, Hinsdale, Mesa, Montrose, Ouray, Saguache, and San Miguel Counties in Colorado, and in Grand and San Juan Counties in Utah. Those proposals initially had a 60-day comment period, ending March 12, 2013, but we extended the comment period by an additional 21 days, through April 2, 2013 (78 FR 15925, March 13, 2013). On July 19, 2013, we published a document announcing that we were extending the timeline for making final determinations on both proposed rules by 6 months due to scientific disagreement, and we reopened the public comment period to seek additional information to clarify the issues in question (78 FR 43123). In accordance with that July 19, 2013, publication, we will submit for publication in the **Federal Register** a final listing determination and a final critical habitat designation for Gunnison sage-grouse on or before March 31, 2014.

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and

specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule to designate critical habitat for the Gunnison sage-grouse is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Consideration of Impacts under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, unless we determine, based on the best scientific and commercial data available, that the failure to designate such areas as critical habitat will result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded,

permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat. In the case of the Gunnison sage-grouse, the benefits of critical habitat include public awareness of the presence of the species and the importance of habitat protection, and, where a Federal action will occur, increased habitat protection for the Gunnison sage-grouse due to protection from adverse modification or destruction of critical habitat. In practice, Federal actions typically occur primarily on Federal lands or for projects undertaken by Federal agencies.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan.

We have not proposed to exclude any areas from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation.

Accordingly, we have prepared a draft economic analysis (DEA) concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**).

Draft Economic Analysis

The purpose of the DEA is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for the Gunnison sage-grouse. The DEA describes the economic impacts of all potential conservation efforts for the Gunnison sage-grouse; some of these costs will likely be incurred regardless of whether we designate critical habitat. The economic impact of the proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place or proposed for the species (e.g., under the proposed Federal listing and other existing Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs.

Most courts have held that the Service only needs to consider the incremental impacts imposed by the critical habitat designation over and above those impacts

imposed as a result of listing the species. For example, the Ninth Circuit Court of Appeals reached this conclusion twice within the last few years, and the U.S. Supreme Court declined to hear any further appeal from those rulings. (*See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 116, (9th Cir. 2010) *cert. denied*, 179 L. Ed. 2d 300, 2011 U.S. LEXIS 1362, 79 U.S.L.W. 3475 (2011); *Home Builders Ass'n of N. Cal. v. United States Fish & Wildlife Serv.*, 616 F. 3rd 983 (9th Cir. 2010) *cert. denied*, 179 L. Ed. 2d 300, 2011 U.S. LEXIS 1362, 79 U.S.L.W. 3475 (2011).)

However, the prevailing court decisions in the Tenth Circuit Court of Appeals do not allow the incremental analysis approach. Instead, the Tenth Circuit requires that the Service consider both the baseline economic impacts imposed due to listing the species and the additional incremental economic impacts imposed by designating critical habitat. (*See New Mexico Cattle Growers Ass'n v. FWS*, 248 F.3d 1277 (10th Cir. 2001).) .The basis for the Tenth Circuit's *New Mexico Cattle Growers* decision in 2001 was its conclusion that the regulatory definitions of "jeopardy" and "adverse modification" were virtually identical, with the result, according to the court, that doing only an incremental analysis rendered meaningless the requirement to consider the impacts of critical habitat designation, as there were no incremental impacts to consider (*New Mexico Cattle Growers Ass'n v. FWS*, 248 F.3d 1283-85). Subsequently, the Service adopted a different definition of "adverse modification," which has led the Ninth Circuit to conclude that the premise underlying the Tenth Circuit's *New Mexico Cattle Growers* decision is no longer valid and that the Service may employ incremental analysis in

determining the economic impacts of a critical habitat designation (*Ariz. Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160, 1173 (9th Cir. 2010)). Consistent with this view, on August 24, 2012, the Service proposed revisions to its regulations for impact analyses of critical habitat that clarify that it is appropriate to consider the impacts of designation on an incremental basis notwithstanding the *New Mexico Cattle Growers* decision (77 FR 51503). However, the proposed rule incorporating the incremental impact approach has not been finalized as of the date of the DEA or this notice. Therefore, this DEA analysis looks at baseline impacts incurred due to the listing of the species, and forecasts both baseline and incremental impacts likely to occur if we finalize the proposed critical habitat designation. For a further description of the methodology of the analysis, see Chapter 2, “FRAMEWORK FOR THE ANALYSIS,” of the DEA.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for the Gunnison sage-grouse over the next 20 years, which was determined to be the appropriate period for analysis because limited planning information is available for most activities to forecast activity levels for projects beyond a 20-year timeframe. It identifies potential incremental costs as a result of the proposed critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to listing.

The DEA quantifies economic impacts of Gunnison sage-grouse conservation efforts associated with the following categories of activity: (1) Livestock grazing; (2)

agriculture and water management; (3) mineral and fossil fuel extraction; (4) residential and related development; (5) renewable energy development; (6) recreation; and (7) transportation activities.

The DEA summarizes the total impacts likely to occur if all of the units proposed are designated as critical habitat. Absent the designation of critical habitat, conservation efforts benefitting the sage-grouse and its habitat would be undertaken due to the listing under the Act (if finalized) and existing management strategies. We forecast baseline impacts of \$9.7 million (in present value terms over 20 years), assuming a discount rate of 7 percent. If we assume the social rate of time preference is 3 percent, forecast baseline impacts are \$12 million (in present value terms over 20 years). Quantified incremental impacts anticipated to result solely from this proposed critical habitat designation are \$3.8 million (present value over 20 years), assuming a 7 percent discount rate, or \$4.7 million (present value over 20 years), assuming a discount rate of 3 percent. The Service believes that impacts forecasted in the DEA are based on several conservative assumptions, more likely to overstate than understate actual impacts, and that the more likely result would be lower impacts.

The DEA presents baseline (Table 1) and incremental (Table 2) results across proposed critical habitat units. The largest share of baseline impacts are attributed to the Crawford and Gunnison Basin units, while the largest share of incremental costs is attributed to the Monticello-Dove Creek unit. In the baseline, the largest category of

impacts is associated with transportation projects (forecast to be \$6.1 million in present value over 20 years, discounted at 7 percent). These costs are borne by Federal and State agencies, and include the cost of species monitoring and management as well as administrative impacts of consultation. The largest share of incremental impacts is also associated with transportation activities (forecast to be \$1.6 million in present value over 20 years, discounted at 7 percent), followed by livestock grazing (forecast to be \$1.2 million in present value over 20 years, discounted at 7 percent) and mineral and fossil fuel extraction (forecast to be \$1.1 million in present value over 20 years, discounted at 7 percent). Incremental transportation impacts consist solely of administrative costs, and are associated with consideration of adverse modification in programmatic consultations for Federal agencies and informal consultations for Colorado and Utah State Department of Transportation projects on non-Federal lands. Impacts associated with livestock grazing consist primarily of potential restrictions on grazing activities on federal lands in unoccupied habitat. These costs would be borne by private ranchers. We believe overall these costs represent a conservative estimate of potential impacts, more likely to overstate than understate costs, and that actual impacts are likely to be less. Impacts associated with mineral and fossil fuel extraction consist entirely of administrative impacts associated with section 7 consultations for future well pad construction in unoccupied habitat. The analysis considers potential impacts to all proposed areas including Tribal lands. See the DEA for a more detailed discussion of these results.

Table 1. Forecast baseline impacts by unit, 2013-2032 (2012\$, 7% discount rate)

UNIT	PRESENT VALUE	ANNUALIZED
Monticello-Dove Creek	\$1,800,000	\$160,000
Piñon Mesa	\$1,700,000	\$150,000
San Miguel Basin	\$770,000	\$68,000
Cerro Summit- Cimarron-Sims Mesa	\$320,000	\$29,000
Crawford	\$2,300,000	\$200,000
Gunnison Basin	\$2,200,000	\$190,000
Poncha Pass	\$630,000	\$55,000
Total	\$9,700,000	\$850,000
Note: Entries may not sum to totals reported due to rounding. Estimates are rounded to two significant digits.		

Table 2. Forecast incremental impacts by unit, 2013-2032 (2012\$, 7% discount rate)

UNIT	PRESENT VALUE	ANNUALIZED
Monticello-Dove Creek	\$1,700,000	\$150,000
Piñon Mesa	\$610,000	\$53,000
San Miguel Basin	\$480,000	\$42,000
Cerro Summit-	\$120,000	\$10,000

Cimarron-Sims Mesa		
Crawford	\$710,000	\$63,000
Gunnison Basin	\$170,000	\$15,000
Poncha Pass	\$29,000	\$2,500
Total	\$3,800,000	\$340,000
Note: Entries may not sum to totals reported due to rounding. Estimates are rounded to two significant digits.		

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rules, the draft EA, and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Ongoing, Landscape-level Conservation Efforts

Since the January 11, 2013, publication of the proposed rule to list the Gunnison sage-grouse as endangered (78 FR 2486) and the proposed rule to designate critical habitat for the Gunnison sage-grouse (78 FR 2540), several ongoing, landscape-level conservation efforts have been finalized or are under development for the species. We

anticipate completion of several of these conservation efforts prior to the final determinations on whether to list the Gunnison sage-grouse and designate critical habitat. If completed, these efforts will be considered in the Service's final determination on whether to list the Gunnison sage-grouse under the Act. Each of these efforts is expected to provide benefits to Gunnison sage-grouse and its habitat, and provide greater certainty regarding future regulation for the participating stakeholders. The primary conservation efforts that have been finalized or are occurring at this time include:

(1) Gunnison Basin candidate conservation agreement (CCA) between the Service and the Bureau of Land Management (BLM), U.S. Forest Service, and National Park Service. Pursuant to section 7 of the Act, conferencing for the CCA was completed on July 30, 2013;

(2) Design of private land conservation programs and practices administered by the Natural Resources Conservation Service (NRCS) to benefit Gunnison sage-grouse. Pursuant to section 7 of the Act, a conference for this action is ongoing with NRCS;

(3) The Service and Farm Service Agency are coordinating to identify funding and programs on private lands that might benefit Gunnison sage-grouse and its habitat. For example, FSA administers the Conservation Reserve Program (CRP) on private lands to re-establish valuable land cover to help improve water quality, prevent soil erosion, and reduce loss of wildlife habitat. A conference pursuant to section 7 of the Act for FSA actions in Gunnison sage-grouse range is pending;

(4) Coordination with the BLM regarding resource management plans and interim management for Gunnison sage-grouse conservation. The BLM issued an Instruction

Memorandum for Gunnison sage-grouse habitat management on July 16, 2013;

(5) County-level agreements, planning, and coordination. All of the Counties within the range of the Gunnison sage-grouse have entered into a Conservation Agreement for the species;

(6) Conservation planning and coordination with the Ute Mountain Ute Tribe for lands owned by the Tribe in the Gunnison Basin; and

(7) Continued enrollment of private lands in the candidate conservation agreement with assurances (CCAA) program for Gunnison sage-grouse. The CCAA pertains to non-Federal lands in Colorado that are occupied by Gunnison sage-grouse, and lands that provide potential habitat that may be occupied by the species in the future.

Required Determinations—Amended

In our January 11, 2013, proposed critical habitat rule (78 FR 2540), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Orders (E.O.s) 12866 and 13563 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), and the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

However, based on the DEA data, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), E.O. 13211 (Energy, Supply, Distribution, and Use), and the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities.

Based on comments we receive, we may revise this determination as part of our final rulemaking.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

To determine if the proposed designation of critical habitat for the Gunnison sage-grouse would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as livestock grazing, agriculture and water management, mineral and fossil fuel extraction, residential

and related development, and renewable energy development. In order to determine whether it is appropriate for our agency to certify that this proposed rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. If we finalize the proposed listing for the Gunnison sage-grouse, in areas where the species is present, Federal agencies will already be required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed designation of critical habitat for the Gunnison sage-grouse. This analysis of impacts relies on the estimated incremental impacts resulting from the proposed critical habitat designation. The incremental impacts of the rulemaking are most relevant for this analysis because they reflect costs that may be avoided or reduced based on decisions regarding the composition of the Final Rule. We anticipate that at most 63 small entities could be affected by livestock grazing consultations at an average cost of \$7,500 each,

representing approximately 1.8 percent of average annual revenues. One small entity could be affected by agriculture and water management consultations at a cost of \$880 within a single year, representing an unknown percentage of annual revenues. Five to nine small entities could be affected by oil and gas extraction consultations per year, at a cost of \$2,600 each in unoccupied habitat, representing approximately 0.04 percent of annual revenues, or a cost of \$880 each in occupied habitat, representing 0.01 percent of annual revenues. In addition, one small entity could be affected by a consultation for exploratory potash extraction in a single year at a cost of \$2,600, representing 0.5 percent of annual revenues. Up to three small entities per year could be affected by consultations for residential and related development, at a cost of \$11,000 in unoccupied habitat, representing less than 0.3 percent of annual revenues, or a cost of \$880 in occupied habitat, representing less than 0.1 percent of annual revenues. One small entity could be affected by renewable energy development consultation, at a cost of \$880 within a single year, representing an unknown percentage of annual revenues. Please refer to the DEA of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

The Service's current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect where a

Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these circumstances, only the Federal action agency is directly regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts, if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the E.O. regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. Information for this analysis was gathered from the Small Business Administration, stakeholders, and the Service. We have identified 72 to 78 small entities that may be impacted by the proposed critical habitat designation. For the above reasons and based on currently

available information, we certify that, if promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

When the range of a species includes states within the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, pursuant to that court's ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we complete an analysis on proposed critical habitat designations pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) (NEPA). The range of Gunnison sage-grouse is entirely within the States of Colorado and Utah, which are within the Tenth Circuit. Accordingly, we have prepared a draft environmental assessment to identify and disclose the environmental consequences resulting from the proposed designation of critical habitat for the Gunnison sage-grouse.

The draft EA presents the purpose of and need for critical habitat designation, the proposed action and alternatives, and an evaluation of the direct, indirect, and cumulative effects of the alternatives under the requirements of NEPA as implemented by the Council on Environmental Quality regulations (40 CFR 1500 *et seq.*) and according to the Department of the Interior's NEPA procedures.

The draft EA will be used by the Service to decide whether or not critical habitat will be designated as proposed; if the proposed action requires refinement, or if another alternative is appropriate; or if further analyses are needed through preparation of an environmental impact statement. If the proposed action is selected as described (or is changed minimally) and no further environmental analyses are needed, then a finding of no significant impact (FONSI) would be the appropriate conclusion of this process. A FONSI would then be prepared for the environmental assessment. We are seeking data and comments from the public on the draft EA, which is available at <http://www.regulations.gov> at Docket No. FWS–R6–ES–2011–0111 and at <http://www.fws.gov/mountain-prairie/species/birds/gunnisonsagegrouse/>.

Executive Order 13211 (Energy, Supply, Distribution, and Use)

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Gunnison sage-grouse occur in areas with oil and gas activity. These areas are primarily limited to the Monticello–Dove Creek and San Miguel populations. Well pads and their existing infrastructure are within proposed critical habitat units. On Federal lands, entities conducting oil and gas related activities as well as power companies would need to consult within areas designated as critical habitat. However, we do not anticipate additional conservation efforts related to

oil and gas beyond those requested to avoid jeopardy to the species. Incremental effects of the proposed critical habitat designation are assumed to occur for energy projects in unoccupied sage-grouse habitat. Approximately 31 producing or newly permitted wells are located within unoccupied portions of the proposed designation. The number of wells within the proposed designation represents less than 1 percent of wells in the State of Colorado. We do not anticipate that the designation of critical habitat would result in significant impacts to the energy industry on a national scale. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

Although no Tribal lands occur within the proposed critical habitat designation, Pine Crest Ranch (approximately 12,000 acres) occurs in the Gunnison Basin Unit (Unit 6) of proposed critical habitat. Pine Crest Ranch is owned by the Ute Mountain Ute Tribe under restricted fee status. The majority of the property is occupied by Gunnison sage-grouse, and four leks occur on the property. In our January 11, 2013, proposed rule to designate critical habitat (78 FR 2540), we considered the Pine Crest Ranch to be private property.

Since February of 2013, the Service has been in communication with the Ute Mountain Ute Tribe. The Service attended a Tribal Council Meeting on March 26, 2013, to discuss the proposed critical habitat designation and proposed listing of Gunnison sage-grouse. The Tribe has expressed an interest in developing a conservation plan for Gunnison sage-grouse on this property and has requested exclusion of the Pine Crest Ranch from the critical habitat designation. We understand that the Tribe's legal department is in the process of developing a conservation plan for their property.

To pursue options for developing a conservation plan, the Service has evaluated conservation funding and opportunities for Pine Crest Ranch through its Partners for Fish and Wildlife Program. We have also coordinated with the Natural Resources Conservation Service (NRCS) to discuss options for enrollment in conservation programs for Gunnison sage-grouse. Depending on the outcome of that discussion, an ongoing

section 7 conference with the NRCS for conservation programs and practices in Gunnison sage-grouse range could include Pine Crest Ranch.

We will conduct government-to-government consultation with the Ute Mountain Ute Tribe throughout the development of the final designation of critical habitat. We will consider the Pine Crest Ranch for exclusion from final critical habitat designation consistent with the requirements of section 4(b)(2) of the Act.

Authors

The primary authors of this notice are the staff members of the Regional Office and Western Colorado Field Office, Mountain-Prairie Region, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Date: August 12, 2013

/s/ Rachel Jacobsen

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

~~[Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for
Gunnison Sage Grouse and Proposed Designation of Critical Habitat for Gunnison
Sage Grouse]~~

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